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MICHAEL RODAK, JR., CLERK

Supreme Court Of The United States

October Term, 1973
No. 73-473

DANIEL T. TAYLOR, III - - - - Petitioner

versus

JOHN P. HAYES, JUDGE
JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, SECOND
DIVISION - - - - - - - - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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SUPREME COURT OF THE UNITED STATES

October Term, 1973
No. 73-473

DANIEL T. TAYLOR, III — *Petitioner*

versus

JOHN P. HAYES, JUDGE, Jefferson Circuit Court, Criminal Branch, Second Division — *Respondent*

NATURE OF THE CASE

This case involves a petition for a writ of certiorari to the Court of Appeals of Kentucky by Daniel T. Taylor, III, whose six months jail sentence for contempt was affirmed by the Court of Appeals of Kentucky, *Taylor* v. *Hayes*, Ky., 494 S.W.2d 739. Taylor is a lawyer, and the respondent, John P. Hayes, is the duly elected, qualified and acting Judge of the Jefferson Circuit Court, Criminal Branch, Second Division, a Court of general jurisdiction in Louisville, Jefferson County, Kentucky.

QUESTIONS PRESENTED

1. Where a contempt sentence does not exceed six months, is the defendant entitled to a trial by jury? The Court of Appeals of Kentucky answered this question in the negative, and the respondent contends that the answer should be in the negative.

2. Where contempts had been committed by an attorney in the prsence of the Trial Judge and the jury,

and where the attorney is immediately cited for contempt and given an opportunity to respond, is a subsequent hearing necessary before sentence is imposed? The Court of Appeals of Kentucky answered this question in the negative, and the respondent contends that the answer should be in the negative.

3. Where there is no showing or evidence of personal bias or hostility, and the Trial Judge is not personally embroiled with the attorney, is it essential that the Trial Judge recuse himself to permit another judge to try the contempts? The Court of Appeals of Kentucky answered this question in the negative, and respondent contends that the answer should be in the negative.

4. Where an attorney in the progress of a criminal trial constantly refuses to desist in his arguments, some in the presence of the jury and some at the bench, refuses upon occasion to maintain his seat so that orderly process of the Court was available to the defendant, disregarded the Court's orders and direction concerning the examination and argued with both jurors and witnesses, launched a long tirade seeking to have the Court remove opaque screens that had been placed over the windows and doors so as to lend some degree of privacy to the proceeding and protect the participants in the trial from the disconcerting demonstrations which were being conducted in and around the building, and where a monumental production was made of the fact that the Court was refusing to permit spectators and crowds, and where an attorney was overbearing, contemptous and obnoxiously persistent in his questions and objections, and where the attorney was intentionally disrespectful to witnesses, was the Trial Judge

justified in holding petitioner in contempt of Court? The Court of Appeals of Kentucky answered this question in the affirmative, and the respondent contends that the answer should be in the affirmative.

STATEMENT OF THE CASE

Petitioner, Daniel T. Taylor, III, was retained counsel for Narvel Tinsley, whose judgment of conviction for his participation in the murder of two policemen was affirmed by the Court of Appeals of Kentucky, *Tinsley* v. *Commonwealth*, Ky., 495 S.W.2d 776. His brother, William M. Tinsley, was represented by three appointed attorneys, Messrs. Fleming, McCall and Scott. The trial lasted from October 18 through October 29, 1971, and both William M. and Narvel Tinsley were sentenced to death. The death sentences were later reduced to life imprisonment pursuant to this Court's judgment in *Furman* v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346.

Before the trial commenced, Narvel Tinsley escaped from jail and was recaptured unharmed. Taylor was cited nine times for contempt, although, after a serious discussion between Taylor and the respondent, the first contempt was changed to a warning.

We start with Volume II of the transcript, page 347, where the Court for the first time held Mr. Taylor in contempt for repeatedly asking questions that he had been directed not to ask. At this point, the Court indicated that it was going to take over the voir dire, and the colloquy continued through page 358, at which point, the respondent rescinded his order of contempt and warned Mr. Taylor. On page 357, respondent ad-

monished Mr. Taylor that his rules were to be obeyed. On page 354, the Court softened his ruling relative to taking complete control of the voir dire. A complete discussion was engaged in between Court and counsel relative to petitioner's conduct. It is obvious that respondent showed great restraint and great consideration in the proceedings concerning this first incident. Consider Mr. Taylor's interrogation of juror, Bruflat, on page 337 through page 345. He had been told not to repeat a certain question yet did it anyway. His questioning of juror, Robitalle, on page 330 through page 332 alone would sustain a contempt citation. Note the smart aleck interrogation of jurors commencing on page 280 and going through page 282 until stopped by the Court on page 283. See page 301 where the Court sustained an objection to a question, and Mr. Taylor replied that he did not believe there was an objection, whereupon, the Court observed he was making the objection, and Mr. Taylor flippantly replied that the Court could certainly sustain it.

The first actual contempt did not occur until Friday, October 22 (Vol. VII, T.E. 1080) when the Court cited Taylor for contempt because he completely and continuously ignored the Court's order not to discuss Narvel Tinsley's escape from the Jefferson County jail. The Court also criticized Taylor's courtroom antics, and a colloquy took place through page 1099. Taylor referred to the escape on page 1078, and after an objection was sustained to it on page 1078, he referred to that "little old case in the Jefferson County . . .", and on page 1080, Taylor was given an opportunity to respond for the record. Although Taylor had been told directly by the

Court how to use a previously written statement, page 1072, he ignored this on page 1075, 1076 and proceeded to inferentially and directly disregard the Court order (T.E. 1071, 1080). The next contempt occurred October 23, 1971, and may be found in Volume IX, page 1355, when after the Court admonished Taylor to stop arguing and Taylor replied, "I'll certainly keep that in mind, your Honor", in a contemptuous and smart aleck manner. Taylor responds to this citation from page 1356 through 1369. The Court comments on Taylor's tone of voice, his motions and his antics on page 1361.

The next one occurred during the cross-examination of Narvel Tinsley by Mr. Schroering and is found in Volume XII, page 1799. On page 1798, the Court had told Taylor to sit down. Taylor interrupted, the Court overruled him, Mr. Taylor continued, and the Court overruled him again, at which time, the proceedings were adjourned to Chambers where again Taylor was cited for contempt of Court. Mr. Taylor was permitted to respond from page 1801, and the discussion continued to and including page 1814. While in Chambers and on page 1804, the Court again admonished that when he ruled that was it and that when he told Taylor to sit down, he meant sit down, and in other words told him to stop arguing with every ruling of the Court and to obey the orders of the Court. We note Mr. Schroering's comments about Mr. Taylor's behavior on page 1814. The next contempt occurred in Volume XIII of the transcript and involved Taylor's direct examination of Ervin Foley, Legal Advisor to the Police Department (T.E. 1946). Taylor was actually held in contempt on page 1956, and on the same page was given an opportunity to

speak in respect to the contempt citation. An objection had been sustained to Taylor referring to a press conference, and he became obstreperous with the Court relative to some seating arrangement (T.E. 1951-1953) and gave a smart aleck reply to the Court's ruling (T.E. 1954, Q37).

Contempt number six involved witness, Jesse Taylor, and involved the use of a statement. The Court had sustained an objection to Taylor's use of the statement on page 2014, Volume XIV and notwithstanding this, Taylor continued to ask the very questions to which the Court had sustained an objection, pages 2015 and 2016, and on page 2016, again held him in contempt and told Taylor he could respond at the next recess.

Contempt number seven again involved Taylor going into the press conference and for waving his arms at a witness in such a fashion that caused counsel for William Michael Tinsley to object (T.E. 2031), and when Taylor was actually held in contempt and given an opportunity to respond for the record, he proceeded to, and after the Court returned, he wanted the record to reflect that at no time had Mr. Schroering been held in contempt. The fact that the Court briefly left the room in no manner prevented Taylor from denying that he had disobeyed the Court's order or that he had not flapped his arms in a contemptuous manner.

The next contempt occurred in Volume XIV, page 2068. Taylor had completed the direct examination of Lt. Garrett when it was called to the Court's attention that one of Mr. Taylor's aides had not been searched. The Court told Taylor to proceed, and Taylor refused. He was held in contempt on page 2069, and again collo-

quy occurred between Taylor and the Court through page 2075. Although the Court directly told Taylor to proceed, Taylor refused.

The last contempt occurred on page 2169 when Taylor asked witness Miller if he had "talked with this nice police officer . . . ", and this inspired an outburst of laughter from the audience (T.E. 2170). Taylor continued his improper examination of this witness in direct disobedience to the Court's order on page 2171, and Taylor again was held in contempt on page 2172, and Taylor made no request to be heard in defense or mitigation.

After the verdict was received, Judge Hayes, respondent, called Taylor to the bench and imposed the sentences on the contempts for which Taylor had previously been cited. After the judgments of contempts were entered and before the Court of Appeals of Kentucky affirmed these judgments, Judge Hayes modified his order and eliminated the request that the sentence be served consecutively and reduced the maximum sentence to that of one to six months.

REASONS FOR NOT GRANTING THE WRIT

I.

PETITIONER WAS NOT ENTITLED TO A TRIAL BY JURY BECAUSE THE ACTUAL SENTENCE IMPOSED DID NOT EXCEED SIX MONTHS.

This Court in *Frank* v. *United States*, 395 U.S. 147, 23 L.Ed.2d 162, 89 S.Ct. 1503, unequivocally held that sentences for criminal contempts of up to six months may constitutionally be imposed without a jury trial.

The judgments here were for criminal contempts, and the sentence did not exceed six months. Therefore, petitioner's claim that his right to a trial by jury was abridged here must fail. *Cheff* v. *Schnackenberg*, 384 U.S. 373, 16 L.Ed.2d 629, 86 S.Ct. 1523.

II.

DUE PROCESS WAS AFFORDED TAYLOR BECAUSE THE CONTEMPTS WERE COMMITTED IN OPEN COURT AND HE WAS GIVEN AN OPPORTUNITY TO RESPOND.

In *Bloom* v. *Illinois*, 391 U.S. 194, 20 L.Ed.2d 522, 88 S.Ct. 1477, we find the following language cited from an earlier case.

> "Due process of law, therefore, in the prosecution of contempt, *except of that committed in open court**, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." (*emphasis ours).

In the case at bar, petitioner was given more than Bloom required. Although he was not entitled to respond under Bloom, he was permitted to do so. Thus, his claim of lack of due process must fail.

III.

THERE WAS NO SHOWING OF BIAS OR PERSONAL HOSTILITY WHICH REQUIRED RESPONDENT TO RECUSE HIMSELF AND PERMIT THE CONTEMPTS TO BE HEARD BY ANOTHER JUDGE.

We reiterate that at no time was petitioner cited for contempt in the presence of the jury. It will be remembered that after the first contempt, it was changed to a warning after a serious discussion between petitioner and respondent about petitioner's conduct. Nothing untoward was ever said by respondent to petitioner in the presence of the jury, although, numerous flippant and disrespectful statements were made to the Trial Judge in Chambers and out of the presence of the jury which would have warranted action by the Trial Judge. The only times petitioner was cited was for his conduct in the presence of the jury. The record in this case defies petitioner's contention that the Trial Court displayed hostility and personal animosity toward petitioner to the extent that another Judge should have tried the contempts. In *Ungar* v. *Sarafite*, 376 U.S. 575, 11 L.Ed.2d 921, 84 S.Ct. 841, this Court held that the characterization by the Trial Judge of Ungar's conduct as contemptuous, disorderly, belligerent, was at most a declaration of a charge against him, and was not a constitutional disqualifying prejudgment of guilt. The Ungar case arose from the trial of Hulan Jack for violation of New York's conflict of interest law and for a conspiracy to obstruct justice. The case here is totally different from *Offut* v. *U. S.*, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed.11 (1954), where there was total war for fourteen days between Offut and the Trial Judge

accompanied by accusations, shouting, unfitting gestures, all of which properly put the case within the recent terms of *Mayberry* v. *Penn.*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532.

At any rate, the Court of Appeals of Kentucky completely disposed of this contention in the following language:

> "Throughout his brief, Taylor complains continuously of the conduct of the judge. He is identified as 'an activist seeking combat' and charged with an actual intent on his part to purposely 'bait' Taylor beyond the endurance of any lawyer to accept such vilification and abuse. The judge is charged with exercising an 'uncontrollable animus' toward Taylor during the entire proceedings and with fighting him on a personal basis because he was attorney for Narvel Tinsley. Taylor's brief says that such charges are grave, and this court agrees with him to the extent of saying that the brief in itself demonstrates something less than complete and total respect for the judicial system of this Commonwealth. Our examination of the record fails to substantiate in the least any of the charges of misconduct on the part of the court that were discussed and complained about in Taylor's brief. In fact, we reach a contrary conclusion, for it seems to us that the court 'leaned over backwards' in an effort to assure Narvel Tinsley a fair trial in spite of the misconduct of his attorney."

The most cursory examination of the record completely supports the finding of the Court of Appeals of Kentucky. The transcript unequivocally shows the Trial Judge did everything but beg petitioner to behave himself, and this he cavalierly refused to do. There were

no insults, vilifications, shouting matches or anything else that would cause any reasonable person to conclude that Judge Hayes was "personally embroiled" with the petitioner to the extent he could not objectively deal with the contempts at the conclusion of the trial. We think that his remarks amount to "a declaration of charges", which is certainly permitted. It is not unusual for a Trial Judge in passing sentence, whether it be for contempt or for any other offense, to castigate the defendant. The fact that a Trial Judge might state at the time of sentencing that this is one of the most aggravated cases he has ever seen has never been successfully asserted as grounds to set aside the sentence as long as the sentence was within the statutory limits and proper sentencing procedures were followed.

IV.

PETITIONER WAS GUILTY OF EACH AND EVERY CONTEMPT FOR WHICH HE WAS CITED AND MANY MORE.

Throughout these proceedings, petitioner has constantly claimed that his actions did not amount to contempt to the extent that the administration of justice was obstructed. This question was resolved adversely to him by the Court of Appeals of Kentucky in a thorough opinion. Contrary to petitioner's assertion, the Court of Appeals of Kentucky outlined all nine contempts for which petitioner was cited. Although we are reluctant to cite copiously from *Taylor* v. *Hayes*, supra, we think the following language by the Court of Appeals of Kentucky defies petitioner's contentions that one, the contempts never occurred, and two, that the Kentucky Court did not consider them.

"We have examined the entire record of the Tinsley trial, and it becomes immediately apparent that even before the trial had 'gotten off the ground, so to speak,' Taylor had embarked upon a plan or program designed to disrupt the trial and by any means possible cause the trial court to commit trial errors which might form the basis of an appeal. His actions were such as to clearly illustrate that they were deliberate, delaying, or planned disruptive tactics which did in fact create such an atmosphere in the court that he, if permitted to continue, would have appeared to be the star performer in the center ring of a three-ring circus. He constantly harassed the court by innumerable objections, statements, and requests for conferences in chambers, and, in truth, the record indicates that a great percentage of the trial time was consumed by the court and counsel attending speeches made by Taylor in the court's chambers.

As the trial progressed, there was a constant refusal on the part of Taylor to desist in his arguments, some in the presence of the jury and some at the bench. He refused upon occasions to maintain his seat so that the orderly processes of the court were available to the defendants. He continuously disregarded the court's orders and directions concerning the examination of jurors or witnesses and persisted in repetitious questioning and argument with both jurors and witnesses. Taylor launched a long tirade seeking to have the court remove opaque screens that had been placed over the windows and doors so as to lend some degree of privacy to the proceedings and protect the participants in the trial from the disconcerting demonstrations which were being conducted in and around the building. Taylor claimed that by the

screening of the windows and doors his client was not receiving a public trial. Later, he made monumental production of the fact that the court was refusing to admit spectators in crowds, claiming that by reason of this policy his client was not receiving a public trial. Again, the clearing of the back two rows of benches in the courtroom following laughter, noise, and other disruptive practices by the spectators was claimed by Taylor to be prejudicial to his client's receiving a fair trial.

There is no necessity of detailing the innumerable acts of Taylor which clearly reflected his contempt for the court as well as the judicial system of this Commonwealth. His actions were such as to place on trial the entire judicial system of the Commonwealth and those judges sworn to uphold its Constitution and laws and thereby assured defendants a fair, orderly, and speedy trial.

Taylor was overbearing, contemptuous, and obnoxiously persistent in his questions and objections, and his misconduct was such that those attorneys representing Michael Tinsley, claiming that his antics prejudiced the rights of their client, were continually objecting to his tactics and moving the court that a severance be granted. The incidents necessitating objections on the part of Michael Tinsley's attorneys were so persistent and so constant that rather than consume the time of the court in a constant repetition of the rather involved objection and motion, the parties got to the place of calling it 'Objection No. 1.' We find all through the record this Objection No. 1 made on behalf of Michael Tinsley.

In the light of the entire record this court can only conclude that Daniel Taylor was guilty of each and every contempt as charged by the court, and if

> the court had so desired there could have been numerous other charges assessed in the course of the trial. In spite of Taylor's contemptuous conduct throughout the trial, we do not find at any point in the record an occasion where Taylor made any personal attack upon the judge, his integrity, or ability. On the contrary, Taylor was polite to the point of almost being condescending. At no time was his conduct of such a nature as to create a personal controversy between him and the court."

The Court also considered *U. S.* v. *Seale*, 7th Cir., 461 F.2d 345 (1972), and the Court of Appeals quoted the following language from *Seale*, which is applicable here.

> "On the positive side of the obstruction question, failure to heed the directive of the court to desist from arguing, to sit down, or to remain quiet may indeed constitute an actual material obstruction to the administration of justice. The unmistakable implication of In re McConnell, 370 U.S. 230, 235, 236, 82 S.Ct. 1288, 8 L.Ed.2d 434, is that defiance of the court's order to cease questioning would have actually obstructed the proceedings. As governor of the trial, the trial judge must have the authority necessary to ensure the orderly and expeditious progress of the proceedings. His directives in exercise of this authority must be obeyed; otherwise the clear result would be courtroom chaos. Wholly arbitrary limits on argument will, if prejudicial, merit reversal of the substantive case, but that hardly can excuse open defiance of the court's commands. * * * We do not say that automation-like reflexive obedience to the court's order is necessary to avoid a contempt citation. The law does not expect unhuman (sic) responsiveness. A certain amount of leeway must be allowed. But

> where the directive is clear, the judge's insistence on obedience is not undercut by his further rejoinder, and the party directed understands what is being asked of him, he must obey. * * *."

The truth of the matter and the transcript shows it is that petitioner fancies himself different from every other practitioner and is suffering under some delusion that he has rights that other lawyers do not enjoy. He has no right, constitutional or otherwise, to deliberately turn a serious criminal trial into chaos.

CONCLUSION

Taylor makes some claim that the Trial Judge by correcting its judgment, and the Court of Appeals of Kentucky's affirmance thereof, that he has been deliberately denied his right to a trial by jury. Petitioner cites *McBride* v. *Commonwealth*, Ky., 432 S.W.2d 410, which involved a collateral attack on an unappealable judgment, and *Beasley* v. *Wingo*, Ky., 432 S.W.2d 413, which involved a sentence from another state. RCr 11.04(1) says in part that if two or more sentences are imposed, the judgment shall state whether they are to be served concurrently or consecutively. We see little reason for a presumption of consecutiveness if the judgment is silent. Irrespective of what *Beasley* v. *Wingo*, said, the Court of Appeals in *Taylor* v. *Hayes*, Ky., 494 S.W.2d 739 said, "The corrected judgment does not direct that the sentences, if amended, be served consecutively; therefore, they must be served concurrently." Therefore, it must be concluded that any inconsistent inference which may be given *Beasley* v. *Wingo* has been overruled by *Taylor* v. *Hayes*, supra.

Certiorari should not be granted here because no federal right of Taylor's is involved.

WHEREFORE, it is respectfully demanded that this Court deny petitioner's petition for a writ of certiorari to the Court of Appeals of Kentucky and grant all other and proper relief in the premises.

Respectfully submitted,

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